Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny

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I. INTRODUCTION

Contemporary constitutional adjudication is characterized by an elaborate system of judicial review composed of multiple levels of scrutiny.[1] The presence of three distinct levels of judicial review, referred to as strict, intermediate, and minimal scrutiny, is perhaps the most significant feature of current constitutional analysis. This multi-level system of scrutiny is a relatively modern development that grew out of the constitutional crisis occasioned by the Supreme Court's clash with Franklin Delano Roosevelt and his New Deal.[2] That episode proved to be one of the most traumatic experiences ever suffered by the Supreme Court.[3] Not since the hostile reaction to its decision in the *Dred Scott* case had the Court's prestige been at such a low ebb.[4] Attacked from all sides for striking down New Deal legislation needed to ameliorate the severe conditions of the Depression, the Court was deeply shaken.[5] President Roosevelt's "Court-packing" plan challenged the very legitimacy of the Court to be the final arbiter of the Constitution.[6] With the "switch in time that saved nine," the Court barely escaped with its authority intact.[7]

The lesson was not lost on the Court. Indeed, the Court can be accused of overreacting to its traumatic collision with the New Deal, for the Court's response was to renounce its power. It did this by adopting a posture of extreme deference to the other branches of government.[8] Henceforth the Court would fain uphold the actions of the other branches of government, granting them a presumption of constitutionality that could be overcome only by showing them to be clearly irrational or unreasonable.[9] This meant that a party challenging governmental action had the

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1. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 522–27 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994–1098 (1978); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

2. L. TRIBE, *supra* note 1, at 450–55; Horowitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 599–604 (1979).

3. *See* L. PFEFFER, THIS HONORABLE COURT 295–320 (1965); A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 481–501 (1965).

4. *See* A. SUTHERLAND, *supra* note 3, at 493–94.

5. *Id.*

6. L. PFEFFER, *supra* note 3, at 312–21.

7. *Id.* at 317–20.

8. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Dennis v. United States, 341 U.S. 494 (1951); Railway Express Agency v. New York, 336 U.S. 106 (1949); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177 (1938).

9. *See* Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L. Q. 153, 163–66 (1975).

difficult burden of proving it to be completely unrelated to any legitimate governmental objective at all.[10] This deferential stance, which has come to be known as minimal scrutiny,[11] has a deceptive lineage to the past. Minimal scrutiny can be traced linguistically to some (albeit not many) early cases in which the Court professed to bestow a presumption of constitutionality upon governmental conduct.[12] In the past, however, the presumption of constitutionality was rarely invoked, and when it was, it was more as a rhetorical formality than as a working principle.[13] After the New Deal Court struggle, though, the presumption of constitutionality was invoked frequently, and not just as a matter of rhetoric; it quickly became a working principle that was used as a matter of course.[14]

When used as a working principle rather than a rhetorical device, the presumption of constitutionality is quite difficult to overcome. It thus provides a high degree of constitutional deference for the actions of the legislative and executive branches of government. It did not take the Supreme Court long to realize, however, that this extreme deference to the other branches of government was not appropriate in all situations. The Court was quick to see that minimal scrutiny does not provide adequate protection for express constitutional rights, such as freedom of speech,[15] or for implicit but nonetheless fundamental rights, such as the right of privacy,[16] or when governmental action is based upon an individious suspect classification, such as race or ethnic origin.[17] In all three of these situations, the Court has retained a more exacting mode of judicial review that requires strict scrutiny of the governmental conduct in question. Under strict scrutiny, governmental action is not presumed to be constitutional, and will not be upheld by the Court unless shown to be necessarily related to a compelling state interest.[18]

As put into operation by the Warren Court, there was a "sharp difference" between strict and minimal scrutiny.[19] Scrutiny that was supposed to be strict in theory turned out to be fatal in practice, while scrutiny that was supposed to be minimal in theory turned out to be nonexistent in practice.[20] As a result, the Warren Court's successor, the Burger Court, has formulated yet a third level of judicial review, which operates as an intermediate form of scrutiny.[21] When using in-

10. *Id.*

11. Gunther, *supra* note 1, at 8.

12. Trade-Mark Cases, 100 U.S. 82, 96 (1879); Sinking-Fund Cases, 99 U.S. 700, 718 (1878); Legal-Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1870); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827); Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 128 (1810).

13. Hurst, *Review and the Distribution of National Powers*, in SUPREME COURT AND SUPREME LAW 140, 156 (E. Cahn ed. 1954); Shaman, *supra* note 9, at 157.

14. L. TRIBE, *supra* note 1, at 450–55; Shaman, *supra* note 9, at 163–66.

15. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Bridges v. California, 314 U.S. 252 (1941); Schneider v. State, 308 U.S. 147 (1939).

16. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

17. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Anderson v. Martin, 375 U.S. 399 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

18. *See* L. TRIBE, *supra* note 1, at 1000–02.

19. The phrase "sharp difference" is from Gunther, *supra* note 1, at 17.

20. Gunther, *supra* note 1, at 8.

21. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Craig v. Boren, 429 U.S. 190 (1976); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971).

termediate scrutiny, the Court will uphold government conduct if it is substantially related to an important governmental interest.[22] Intermediate scrutiny was first developed in equal protection cases as a means of evaluating government classifications, such as those based upon gender or illegitimacy,[23] that bear at least some of the characteristics of a suspect classification.[24] More recently, it has been imported for use in first amendment cases concerning commercial speech, which the Court believes to be not as fragile as other forms of speech,[25] and in those freedom of speech cases in which restrictions of expression are unrelated to its ideological content.[26] Intermediate scrutiny allows the Court to take a neutral stance that favors neither the government nor the party challenging it.

There are, then, three distinct levels, or tiers, of judicial review that are invoked in their respective spheres. The most pronounced use of the multi-level system, as well as its fullest development, has occurred in cases arising under the equal protection clause.[27] In equal protection decisions spanning the last three decades, the Supreme Court has engaged in a continual elaboration of the multi-tier system, attempting to refine it in case after case.[28] Through this extensive experience in equal protection clause cases, the system may have reached its breaking point. By now highly rarefied, the system of multi-level scrutiny has suffered several serious strains, which may reveal that it is fundamentally flawed and destined to collapse.

II. Dissension in the Ranks: Judicial Opposition to the Present System

A. *Criticism of the System*

Several Supreme Court Justices have openly criticized the multi-level system of judicial review. The first to do so was Justice Marshall, in a series of dissenting opinions beginning in 1970 before the emergence of intermediate scrutiny.[29] Justice Marshall believes that the multi-tier approach is an oversimplification that does not accurately reflect the adjudicative process in constitutional cases.[30] He claims that a principled reading of the Court's decisions reveals a spectrum, or "sliding scale," of scrutiny that is calibrated by degrees rather than by two or three tiers.[31] Under this conception, the operative degree of scrutiny is determined by the character of the government classification in question—that is, the extent of its invidiousness—and

22. See *supra* note 21 (citing cases).

23. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971).

24. *See infra* text accompanying notes 143–56.

25. *See, e.g.*, Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

26. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

27. *See* L. Tribe, *supra* note 1, at 1000; Gunther, *supra* note 1, at 8.

28. *See* Gunther, *supra* note 1, at 8–10.

29. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318–21 (1976) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417, 432–33 (1974) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90–91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519–21 (1970) (Marshall, J., dissenting).

30. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318–21 (1976) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

31. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

the relative importance of the individual and state interests affected by the classification.[32]

Moreover, Justice Marshall maintains that the multi-level system is a "rigidified approach"[33] that hinders proper constitutional analysis in two respects. First, it misdirects constitutional analysis by deflecting the focus of inquiry toward abstractions (the tiers of scrutiny) that have little to do with the specific merits of a case.[34] Second, it inhibits constitutional analysis by using *a priori* definitions (such as "fundamental right" and "suspect classification") to trigger the operative tier of scrutiny.[35] Originally, Justice Marshall's criticism was directed at the multi-level system when it consisted of two tiers, strict and minimal scrutiny.[36] The addition of a third level of review, intermediate scrutiny, did not address the defects of the system identified by Justice Marshall, and he has remained critical of the system in its revised form.[37]

While intermediate scrutiny was in an incipient stage, Justice Marshall authored a majority opinion for the Court in *Chicago Police Department v. Mosley*,[38] which offered a single standard of review as an alternative to the multi-tier approach. Marshall's opinion stated that the crucial question in all equal protection cases is whether there is "an appropriate governmental interest suitably furthered" by the government regulation in question.[39] This comprehensive inquiry consolidates the levels (or, as may be the case, the degrees) of scrutiny into a unified formula for all cases.

Use of the *Mosley* standard, however, was short-lived, a majority of the Court evidently preferring to concentrate its attention upon further refining intermediate scrutiny. Yet, despite the evolution of intermediate scrutiny, dissatisfaction with the multi-level system has continued to increase on the Supreme Court. In *Craig v. Boren*,[40] the case in which the precise standards of intermediate scrutiny were first articulated,[41] both Justice Rehnquist and Justice Stevens took occasion to express their objections to the multi-level approach. In his dissenting opinion in *Craig*, Justice Rehnquist first took the stance of a literalist, opposing the enunciation of the intermediate standard of review on the ground that the equal protection clause "contains no such language."[42] Turning to more practical concerns, he also contended

32. *See supra* note 29 (citing cases).

33. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting). *See also* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318, 321 (1976) (Marshall, J., dissenting).

34. Dandridge v. Williams, 397 U.S. 471, 519 (1970) (Marshall, J., dissenting).

35. *Id.* at 520.

36. *Id.*; Richardson v. Belcher, 404 U.S. 78, 90–91 (1971) (Marshall, J., dissenting).

37. *See* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318–21 (1976) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417, 432–33 (1974) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

38. 408 U.S. 92 (1972).

39. *Id.* at 95.

40. 429 U.S. 190 (1976).

41. *Id.* at 197.

42. *Id.* at 220 (Rehnquist, J., dissenting).

that the Court has encountered "enough difficulty" with two tiers of review "to counsel weightily" against the recognition of yet another tier.[43]

Justice Stevens responded to these arguments in a concurring opinion. He agreed that there is a discrepancy between the use of multiple tiers of review and the fact that there is only one equal protection clause, which does not direct the courts to apply one standard of review in some cases and a different standard in other cases.[44] Justice Stevens, however, went on to observe that whatever criticism may be directed toward a three-level approach "applies with the same force" to a two-level approach.[45] Furthermore, Justice Stevens, echoing Justice Marshall before him, described the multi-level system as obscuring what in reality is a more unitary standard of review. The system, he was inclined to believe, is not "a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[46]

B. *Departure from the System*

Dissatisfaction with the multi-level system is also manifest in the increasingly frequent departures from it. The creation of intermediate scrutiny, which itself was a departure from the two-tier approach, was able to abate further deviation from the system only temporarily. Thereafter, defections from the system have increased in number. These defections can be quite pointed, as in the plurality opinion authored by Chief Justice Burger in *Fullilove v. Klutznick*,[47] which, while approving an affirmative action program, tersely declined to adopt any tier of review.[48]

A similar abandonment of the system occurred in the majority opinion written by Justice Rehnquist in *Rostker v. Goldberg*,[49] in which the Court was presented with an equal protection challenge to a federal statute requiring men, but not women, to register for the draft.[50] In deciding this challenge, the Court was faced with the dilemma that on the one hand, federal statutes dealing with military affairs are subjected to only minimal scrutiny, whereas, on the other hand, gender-based classifications are subjected to intermediate scrutiny.[51] Rather than resolve this problem, the Court refused to deal with it, by asserting that there was no reason to further refine the multi-tier system.[52] The levels of scrutiny, continued the Court, "may all too readily become facile abstractions used to justify a result,"[53] which is exactly what Justice Marshall has been insisting all along.

Another case that marks an apparent conversion to Justice Marshall's way of thinking is *Plyler v. Doe*,[54] in which the Court utilized a flexible comprehensive

43. *Id.* at 220–21 (Rehnquist, J., dissenting).
44. *Id.* at 211–12 (Stevens, J., concurring).
45. *Id.* at 212 (Stevens, J., concurring).
46. *Id.*
47. 448 U.S. 448 (1980).
48. *Id.* at 492.
49. 453 U.S. 57 (1981).
50. *Id.* at 59.
51. *Id.* at 64–69.
52. *Id.* at 69–70.
53. *Id.*
54. 457 U.S. 202 (1982).

standard in lieu of the *a priori* categories that normally obtain under the multi-tier approach.[55] Justice Brennan wrote the majority opinion in *Plyler*, striking down a state law that denied free public education to the children of illegal aliens. Although the state law fell into none of the categories previously held to invoke either of the forms of heightened scrutiny (strict or intermediate), the Court nevertheless concluded that the intermediate tier was the appropriate standard of review.[56] This conclusion was reached through an analysis previously suggested by Justice Marshall, that is, by evaluating the invidiousness of the classification at hand and the relative importance of the individual and state interests at stake.[57] The Court devoted six pages to this analysis,[58] in the course of which it stated that more was involved in the case than the "abstract question" of whether the law discriminates against a suspect class or whether education is a fundamental right.[59]

The opinions in *Plyler*, *Rostker*, and *Fullilove* are self-evident departures from the multi-tier system. On other occasions, deviation from the system is less blatant, and is accomplished through a variety of devices: (1) upgrading minimal scrutiny; (2) downgrading intermediate scrutiny; and (3) carving out exceptions to strict scrutiny.

1. *Upgrading Minimal Scrutiny*

One technique for upgrading minimal scrutiny is to constrict the deference that it normally affords for governmental objectives. This was done in *United States Department of Agriculture v. Moreno*,[60] which is one of the few cases in which the Court, while professing to follow minimal scrutiny standards, nevertheless struck down legislation.[61] In *Moreno*, the doomed legislation was an amendment to the Food Stamp Act that precluded unrelated persons who lived together from eligibility for food stamps.[62] The legislative history of the amendment indicated that it was motivated by a desire to penalize "hippies," which the Court held was an illegitimate governmental goal.[63] This contradicted the Court's usual practice under minimal scrutiny, which was to deem legislative motive irrelevent[64] and to posit hypothetical or speculative ends for legislation that had no discernible legitimate purpose.[65] By taking a more critical view of the governmental objective in *Moreno*, the Court invested minimal scrutiny with an acuity it ordinarily did not possess.

The same technique was employed more recently in *Zobel v. Williams*,[66] which

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55. *Id.* at 218–24.
56. *Id.* at 224.
57. *See supra* text accompanying note 32.
58. 457 U.S. 202, 218–24 (1982).
59. *Id.* at 223.
60. 413 U.S. 528 (1973).
61. *See also* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Zobel v. Williams, 457 U.S. 55 (1982).
62. 413 U.S. 528, 529 (1973).
63. *Id.* at 534–35.
64. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); McGowan v. Maryland, 366 U.S. 420 (1961); Flemming v. Nestor, 363 U.S. 603 (1960).
65. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Railway Express Agency v. New York, 336 U.S. 106 (1949); Goesart v. Cleary, 335 U.S. 464 (1948).
66. 457 U.S. 55 (1982).

involved an Alaska statute distributing annual dividends from windfall oil revenues to state residents. According to the statute, the value of the dividend paid to each recipient depended upon his or her length of residency within the state—the longer the residency, the larger the dividend.[67] In evaluating this statutory scheme, the Court was presented with a dilemma similar to the one it faced in *Rostker v. Goldberg*.[68] Arguably, either strict or minimal scrutiny could appropriately have been applied to the Alaska legislation, since it possessed some, but not all, of the attributes of a durational residency requirement, which ordinarily evokes the stricter form of review.[69] Once again the Court sidestepped this dilemma, this time by stating that "if the statutory scheme cannot pass even the minimal test . . . we need not decide whether any enhanced scrutiny is called for."[70] Then, purportedly using minimal scrutiny, the Court went on to hold that the Alaska legislation could not be justified by any of the purposes advanced in its defense.[71] One of those purposes was to reward citizens for contributions, both tangible and intangible, made in the past to the state, which the Court held was not a legitimate governmental objective.[72] To support this holding, the Court reached beyond the bounds of minimal scrutiny by relying on two cases, *Shapiro v. Thompson*[73] and *Vlandis v. Kline*,[74] both of which utilized the strict form of review. And, in rejecting the governmental goal in *Zobel*, the Court contravened its usual practice under minimal scrutiny of either accepting or postulating objectives to bolster the validity of legislation.[75]

It is also possible to upgrade minimal scrutiny by reducing the deference it customarily allows for governmental means. When utilizing minimal scrutiny, the Court regularly sustains legislation that bears little, if any, relationship to a legitimate end, by exercising extreme tolerance for overinclusive and underinclusive legislative means.[76] This sort of tolerance was notably lacking in both *Moreno* and *Zobel*, as well as in another recent decision, *Logan v. Zimmerman Brush Co.*,[77] which also purported to employ the minimal tier of review. In *Moreno*, the Court ruled that the amendment in question could not be sustained as a means of preventing fraud, because it was not rationally related to that purpose.[78] Similarly, in *Zobel*, the Court held that the Alaska statute could not be justified as a means of encouraging residence in the state or of ensuring prudent management of the dividend fund, because it was

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67. *Id.* at 56–57.

68. *See supra* text accompanying note 51.

69. Zobel v. Williams, 457 U.S. 55, 58–60 (1982). For example, the Alaska legislation did not "impose any threshold waiting period on those seeking dividend benefits." *Id.* at 58.

70. *Id.* at 60–61.

71. *Id.* at 61–64.

72. *Id.* at 63.

73. 394 U.S. 618 (1969).

74. 412 U.S. 441 (1973).

75. *See supra* note 65 (citing cases).

76. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318–21 (1976) (Marshall, J., dissenting); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); Goesart v. Cleary, 335 U.S. 464 (1948).

77. 455 U.S. 422 (1982).

78. 413 U.S. 528, 535–38 (1973).

not rationally related to either of those objectives.[79] In *Logan*, a majority of the Court found that a statutory condition requiring the dismissal of a complaint unless a factfinding conference was convened within 120 days was not rationally related to the goal of discouraging unfounded claims or of expediting resolution of disputes.[80] Thus, in all three of these decisions the Court restricted the indulgence that normally prevails under minimal scrutiny for overinclusive and underinclusive legislation, and thereby sharpened the level of review.

These cases illustrate that minimal scrutiny may be upgraded by granting less obeisance than usual either to the ends or means of governmental action. Ironically, the practice of upgrading minimal scrutiny restores that tier to its original form, which, had it been retained, probably would have obviated the need to create intermediate scrutiny. As first conceived by the Supreme Court, minimal scrutiny provided substantial, but not absolute, deference to the other branches of government.[81] This was soon modulated to total deference, which led the Court to uphold governmental action that was not in actuality reasonably related to a legitimate state interest,[82] and which widened the gap between the strict and minimal tiers.[83] Had the original nonabsolute version of minimal scrutiny been maintained, an intermediate level would not have been necessary to alleviate this situation.

2. *Downgrading Intermediate Scrutiny*

Despite the felt need for an intermediate tier of review,[84] the Court has resorted, on at least one occasion, to downgrading intermediate scrutiny. This occurred in *Michael M. v. Superior Court*,[85] in which the Court sustained the constitutionality of a gender-based classification making only males criminally liable for the act of statutory rape.[86] The task of writing what turned out to be a plurality opinion in *Michael M.* inexplicably was assigned to Justice Rehnquist, who, in a series of previous cases, had parted company with his colleagues on the Court by objecting to the use of anything stronger than minimal scrutiny to evaluate gender classifications.[87] In *Michael M.*, however, Justice Rehnquist rose to the occasion, and produced an opinion that is a *tour de force* of disingenuousness that three other Justices were somehow willing to join.[88] The first sign of dissimulation appears early

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79. 457 U.S. 55, 61–63 (1982).

80. 455 U.S. 422, 438–42 (1982) (separate opinion of Blackmun, J., joined by Brennan, J., Marshall, J., and O'Connor, J.); 455 U.S. 422, 443–44 (1982) (concurring opinion of Powell, J., joined by Rehnquist, J.).

81. *See* United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

82. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Dennis v. United States, 341 U.S. 494 (1951); Railway Express Agency v. New York, 336 U.S. 106 (1949); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938).

83. Gunther, *supra* note 1, at 17.

84. *See supra* text accompanying notes 19–26.

85. 450 U.S. 464 (1981).

86. *Id.* at 466.

87. Craig v. Boren, 429 U.S. 190, 217–21 (1976) (Rehnquist, J., dissenting). *See also* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 153–54 (1980) (Rehnquist, J., dissenting); Califano v. Goldfarb, 430 U.S. 199, 224–25 (1977) (Rehnquist, J., dissenting); Trimble v. Gordon, 430 U.S. 762, 777–86 (1977) (Rehnquist, J., dissenting).

88. Chief Justice Burger and Justices Stewart and Powell joined the opinion of Justice Rehnquist. Justices Stewart and Blackmun each filed concurring opinions. Justice Brennan filed a dissenting opinion, joined by Justices White and Marshall. Justice Stevens filed a separate dissenting opinion.

in the opinion, with the statement that prior cases show that "the Court has had some difficulty in agreeing upon the proper approach and analysis" in cases involving gender-based classifications.[89] This statement, of course, neglects to mention that in previous cases the Court had established beyond a doubt that gender-based classifications are subject to intermediate scrutiny.[90] Though grudgingly acknowledging the existence of an intermediate tier of scrutiny, the opinion degrades its character by portraying it as merely "somewhat" sharper than the minimal tier.[91]

As put into practice in the *Michael M.* plurality opinion, intermediate scrutiny lost even that edge, being blunted upon contact with the essential issue in the case, which was the relationship between the gender-based classification and its purpose of deterring teenage pregnancy. It had been argued to the Court that by excluding females from its coverage, the statutory rape provision was impermissibly underinclusive, because a gender-neutral provision would be equally effective to deter teenage pregnancy.[92] The plurality opinion rejected this argument on two grounds, neither of which comport with the requirements of intermediate scrutiny. First, it was deemed irrelevant that the gender-based provision was no more effective than a gender-neutral one would be.[93] This stance indulges a greater amount of underinclusiveness than is normally permitted under intermediate scrutiny; in fact, it indulges a substantial amount of underinclusiveness. Significantly, in taking this position, Justice Rehnquist's opinion cited but one precedent—*Kahn v. Shevin*,[94] a decision from the nascent stage of intermediate scrutiny, which saw the Court momentarily regress to the use of minimal scrutiny to deal with a gender-based classification.[95] Not content with this handiwork, Justice Rehnquist found yet another way to indulge underinclusiveness—by refusing to recognize its presence. His opinion avows an unwilligness to admit that a gender-neutral statutory rape provision would be as effective as a gender-based one, because the former "may well be incapable of enforcement."[96] As pointed out in a dissenting opinion, this overlooks the fact that thirty-seven states previously had enacted gender-neutral statutory rape laws and apparently had encountered no difficulty in enforcing them.[97] This pertinent data is ignored in Justice Rehnquist's opinion, which heedlessly assumes that the legislative classification is sufficiently related to its purpose. In persisting in this assumption despite factual data belying it, the opinion displayed an uncritical deference to governmental action that is typical of minimal, and not intermediate, scrutiny.

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89. 450 U.S. 464, 468 (1981) (opinion of Rehnquist, J.).

90. *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

91. 450 U.S. 464, 468 (1981).

92. *Id.* at 473.

93. *Id.*

94. 416 U.S. 351 (1974).

95. *Compare id. with* cases cited *supra* note 90. *See also* L. TRIBE, *supra* note 1, at 1067–70.

96. 450 U.S. 464, 473–74 (1981).

97. *Id.* at 492–93 (Brennan, J., dissenting).

3. *Carving Out Exceptions to Strict Scrutiny*

Departures from heightened scrutiny also are effectuated by the device of carving out exceptions to the strict tier of review. Such exceptions have been devised in several areas, one of which is the right of interstate travel. In a line of cases that began with *Shapiro v. Thompson*,[98] the Court has held that interstate travel is a fundamental right implicitly guaranteed by the Constitution.[99] Accordingly, state residency requirements that impinge upon this right are subject to strict scrutiny, and will be struck down unless shown to be necessarily related to a compelling state interest.[100] Under this standard, the Court has invalidated residency requirements that condition eligibility for welfare benefits,[101] voting,[102] and free medical care.[103] On the other hand, the Court has summarily affirmed a lower court decision upholding the practice of a state university charging higher tuition rates to nonresidents.[104] Additionally, in *Memorial Hospital v. Maricopa County*[105] the Court said that strict scrutiny is not applicable to residency requirements that do not penalize the right of interstate travel by denying a necessity of life.[106] Although the Court has yet to follow up on this distinction, it opens the door for the development of a substantial exception from the application of strict scrutiny to residency requirements.

In several cases since *Maricopa*, the Court has found other ways to exempt from strict scrutiny state laws that affect the right to travel. The first of these decisions, *Sosna v. Iowa*,[107] sustained a requirement that a person reside in the state for one year before being allowed to file a divorce action against a nonresident. Although the state residency requirement in *Sosna* affected no fewer than two fundamental rights—the right of interstate travel as well as the right of marital association[108]—a majority of the court saw fit to use only minimal scrutiny, on the ground that the area of domestic relations "has long been regarded as a virtually exclusive province of the States."[109] In a feeble attempt to support this proposition, the Court cited three cases,[110] the latest of which had been decided in 1899, while overlooking no fewer than ten more recent and more apposite decisions that take an opposite position.[111] Through this

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98. 394 U.S. 618 (1969).

99. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

100. *See supra* note 99.

101. Shapiro v. Thompson, 394 U.S. 618 (1969).

102. Dunn v. Blumstein, 405 U.S. 330 (1972).

103. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

104. Starns v. Malkerson, 401 U.S. 985 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441 (1973) (striking down an irrebuttable presumption of nonresidence for determining certain students' tuition rates at state-run schools).

105. 415 U.S. 250 (1974).

106. *Id.* at 258–59.

107. 419 U.S. 393 (1975).

108. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971).

109. 419 U.S. 393, 404 (1975).

110. *Id.* The three cases are: Simms v. Simms, 175 U.S. 162 (1899); Pennoyer v. Neff, 95 U.S. 714 (1878); Barber v. Barber, 62 U.S. (21 How.) 582 (1859).

111. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

belaboring of precedent, the Court was able to contrive an exception to the scope of strict scrutiny.

The approach taken in *Sosna* was eschewed in a later decision, *Jones v. Helms*,[112] which involved a state statute that made it a crime for a parent to willfully abandon a dependent child. According to the statute, the crime was a misdemeanor unless the parent left the state after abandoning the child, in which case it was raised to a felony.[113] Although the statute obviously concerned domestic relations, the Court made no reference to the *Sosna* rationale, choosing instead to fashion a different exception to strict scrutiny. Although the right to travel is fundamental, the Court explained, it is not "unqualified," and may be lost, as it was here, through the commission of a crime.[114] Therefore it was concluded that strict scrutiny would not be applied to the state statute, because it "did not penalize the exercise of the constitutional right to travel."[115] In other words, the right to travel is fundamental, but not always—it is only fundamental when it has not been qualified. Although the Court's decision in *Jones* may be correct, its reasoning is open to considerable question. The premise of the Court's opinion amounts to the tautology that the right to travel is fundamental when it is fundamental. This sophistry could have been avoided without changing the result in *Jones* by holding that under strict scrutiny the fundamental right to travel was outweighed by a compelling state interest in protecting dependent children. Instead, the Court elected to devise yet another exception to the scope of strict scrutiny.

In *Jones* and *Sosna*, the Court was able to avoid the application of heightened scrutiny by devising an exception to what otherwise would have been recognized as a fundamental interest calling for the strict level of review. Not only fundamental interests, however, are subject to this technique; the Court has also eschewed strict scrutiny by formulating an exception to the suspect classification of alienage. Classifications based on alienage, like those based on race or national origin, have been held suspect and therefore held to evoke strict scrutiny.[116] Under this analysis, the Court has struck down state laws[117] that preclude aliens from eligibility for welfare benefits,[118] civil service employment,[119] admission to the bar,[120] scholarships,[121] and the practice of civil engineering.[122] More recently, though, the Court has had second thoughts about alienage classifications, stating that it is "inappropriate" to subject all state exclusion of aliens to strict scrutiny, because "to do so would

112. 452 U.S. 412 (1981).
113. *Id.* at 413.
114. *Id.* at 420.
115. *Id.* at 426.
116. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dugall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).
117. Because of the "paramount federal power over immigration and naturalization," Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976), the Court is more tolerant of federal regulation of aliens. *See id.*; Matthews v. Diaz, 426 U.S. 67 (1976).
118. Graham v. Richardson, 403 U.S. 365 (1971).
119. Sugarman v. Dugall, 413 U.S. 634 (1973).
120. *In re* Griffiths, 413 U.S. 717 (1973).
121. Nyquist v. Mauclet, 432 U.S. 1 (1977).
122. Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).

'obliterate all the distinctions between citizens and aliens.'"[123] Therefore, the Court has decided to exempt alienage classifications from strict scrutiny when they concern "'matters firmly within a State's consitutional prerogatives.'"[124] Using only minimal scrutiny for such matters, the Court has upheld state laws that bar aliens from employment as state troopers,[125] public school teachers,[126] and deputy probation officers.[127] By the Court's own admission, its decisions concerning alienage classifications "have not formed an unwavering line."[128] Dissenters from the majority approach maintain that the Court's decisions concerning alienage are impossible to reconcile, in that a state has no greater interest in excluding aliens from employment as state troopers, teachers, or probation officers than it does in excluding them from employment as civil servants, attorneys, or engineers.[129] Nonetheless, a slim majority[130] of the Court seems more intent upon avoiding strict scrutiny than in achieving consistency in these cases. Whether consistent with precedent or not, what the Court has done in recent cases dealing with alienage classifications is to contrive yet another exception to the use of strict scrutiny.

C. *The Current State of the System*

Examination of contemporary cases shows that the Supreme Court's dissatisfaction with the multi-tier system of judicial review is extensive. Several Justices have gone so far as to openly criticize the system in no uncertain terms.[131] More significantly, departures from the system already are numerous and continue to mount.[132] Deviation from the system may occur overtly or covertly, but occur it does, and it can be found in all three levels of scrutiny. Defections from the system happen often enough that they may no longer be dismissed as mere lapses or aberrations. There are now so many ways to depart from the system that it frequently is impossible to know what level of scrutiny will be applied in a particular case. In short, the system is attenuated to such a degree that it may be beyond repair.

III. FLAWS IN THE SYSTEM

The strains that have appeared in the system of multi-level review can be traced to flaws in the system itself. Justice Marshall's outline of these flaws[133] can be used as a starting point for a deeper comprehension of them.

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123. Foley v. Connelie, 435 U.S. 291, 295 (1978) (quoting Nyquist v. Mauclet, 432 U.S. 1, 14 (1977)).

124. *Id.* at 296 (quoting Sugarman v. Dugall, 413 U.S. 634, 648 (1973)).

125. *Id.*

126. Ambach v. Norwick, 441 U.S. 68 (1979).

127. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

128. Ambach v. Norwick, 441 U.S. 68, 72 (1979).

129. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 453–54 (1982) (Blackmun, J., dissenting); Ambach v. Norwick, 441 U.S. 68, 81–90 (1979) (Blackmun, J., dissenting); Foley v. Connelie, 435 U.S. 291, 302–07 (1978) (Marshall, J., dissenting); *see also id.* at 310–12 (Stevens, J., dissenting).

130. *Foley v. Connelie* was a 6–3 decision, whereas *Ambach v. Norwick* and *Cabell v. Chavez-Salido* were 5–4 decisions.

131. *See supra* subpart II(A).

132. *See supra* subpart II(B).

133. *See supra* text accompanying notes 29–39.

A. *Rigidity*

Perhaps the most obvious flaw of the multi-level system is its rigidity.[134] Under the system, decisionmaking is initiated with a heavy finger pressing upon one or another of three predetermined places on the constitutional scale. As a result, the ultimate acceptance or rejection of government action strongly depends upon, and may even be foreordained by, the level of scrutiny that obtains in a given case. In situations calling for minimal scrutiny, government action is almost automatically sustained, while in situations calling for strict scrutiny, it is almost automatically struck down. This inflexibility gives the Court no other choice but to either render questionable decisions or to deviate from the norms of the system.

The system's rigidity is most pronounced in the minimal tier of review. Since minimal scrutiny is virtually no scrutiny, the Court has no other option but to uphold irrational legislation or manipulate the standards of minimal scrutiny to strike down the legislation. In the vast majority of minimal scrutiny cases, the Court takes the former course of action and sustains legislation by pretending it is reasonable, although the Court must know that the opposite is true. In those few instances when the Court takes the latter course of action, it is required, as we have seen,[135] to transform minimal scrutiny into a more heightened mode of review. If the alternatives available under minimal scrutiny were not so limited, it might not have been necessary for the Court to fashion an intermediate tier of review.[136] Although the creation of intermediate scrutiny elevated some cases from the rigidity of the lowest tier, it did nothing to enhance the options available in those cases that remain subject to only minimal scrutiny. Thus, judicial review in the minimal tier remains inflexible. In the last few years, a minority of Justices have become frustrated with this inflexibility, asserting that minimal scrutiny should not be so "toothless" as to allow legislation to be sustained by "flimsy or implausible justifications . . . proffered after the fact by Government attorneys."[137] But, although minimal scrutiny could be restored to its original status, which granted substantial but not total deference to the other branches of government,[138] a majority of the Court has not yet been willing to do so.

Moreover, even if minimal scrutiny were to be rehabilitated, it is not certain that the multi-tier system would provide sufficient flexibility for the Court. It has already been observed that manipulation of the standards of the system occurs not only in the lowest tier, but in all three of them,[139] which is a strong indication that the Court finds the overall system too rigid. This may be because the system, if honestly followed, allows little discretion in choosing which tier of scrutiny to apply in a given case. If present in a case, various factors trigger a particular level of scrutiny, which the Court is then obligated to use. In turn, this may lead the Court to undesirable

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134. *See* Gunther, *supra* note 1, at 8–12.

135. *See supra* text accompanying notes 60–80.

136. *See supra* text accompanying notes 81–83.

137. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 605–11 (1979) (White, J., dissenting); Matthews v. Lucas, 427 U.S. 495, 510 (1976).

138. *See* United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

139. *See supra* text accompanying notes 60–132.

decisions, which can only be avoided by manipulating the criteria of the system. It may be, then, that even with refurbishing, the system as a whole is too rigid.

B. *Inhibition of Analysis*

Another deficiency of the multi-tier approach is that it hampers legal analysis by focusing the inquiry toward abstractions that are divorced from the specific merits of a case. Under the system attention is concentrated on conceptions about classifications, interests, levels of scrutiny, and the like, to the extent that the actual merits of a case are neglected, if not lost altogether in the shuffle. The system channels attention away from the particular issues and factual details of cases and toward general questions about the level of scrutiny that should be adopted. After reading the Court's opinions in constitutional cases or the briefs submitted therein, one frequently comes away with a sense of having seen the forest but not the trees. Under the multi-level system, cases become primarily concerned with the problem of judicial review, to the exclusion of the specific disputes that gave rise to them.

Additionally, the multi-level system impedes legal analysis, in a most serious way, by imposing categories upon the constitutional balancing process. All constitutional adjudication, regardless of the structure through which it is accomplished, necessarily entails a balancing or comparative evaluation of governmental and individual interests.[140] The essential issue in all constitutional cases is whether the governmental interests promoted by state regulations are sufficiently important to outweigh the individual interests thereby restricted.[141] Short of abolishing judicial review, there is no way to eliminate the balancing process from constitutional decisionmaking, and the multi-tier system certainly does not do so. It does, however, filter the appraisal of interests through *a priori* categories, with each level of scrutiny depending upon several of these categories, such as "valid state interest," "fundamental right," "suspect classification," and the like. This results in a species of constitutional adjudication that can be described as categorical balancing.[142]

The *a priori* categories by which the multi-level approach operates are abstract generalizations. As such, they dilute constitutional analysis. Individual rights are conceptualized as either fundamental or not, with nothing in between. Classifications of individuals are thought of as suspect, almost suspect, or nonsuspect, but nothing else. Governmental ends may be compelling, important, valid, or invalid, but no other possibilities are conceivable. Governmental means may be necessary, substantial, rational, or irrational, but there the list ends. This sort of categorical thinking squeezes the appraisal of interests into prefabricated boxes that allow for no variation beyond their own dimensions. Stringently confined as it is, categorical balancing

140. *See* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75–80. *See generally* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236 (1983); Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982).

141. *See supra* text accompanying note 140.

142. This sort of categorical or definitional balancing is discussed in the context of the first amendment in Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968). *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1334 n.3 (10th ed. 1980).

does not provide adequate calibration for evaluating the diverse interests that arise in constitutional litigation.

Categorical balancing exacerbates the rigidity of the multi-tier approach by increasing its propensity to predetermine the result of cases. The *a priori* labels ascribed to governmental and individual interests tend to preordain their constitutional fate. Through the categorization of governmental and individual interests, their evaluation is diffused, and their relative merit is prejudged.

C. *Internal Inconsistency*

The *a priori* categories used in the multi-level system have not always been capable of providing internal stability for the system. In fact, internal inconsistency has plagued several of the categories that have been stalwarts of the system, beginning with the category of suspect classifications. Early in the history of the multi-tier approach, the Court defined a suspect classification as one directed at a "discrete and insular minorit[y]."[143] Later cases described a suspect class as consisting of persons "'subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[144] A suspect classification can be identified as a badge or stigma of inferiority,[145] and often is based upon an immutable trait or accident of birth or condition.[146] Race is the paradigm suspect classification, and has been recognized as such by the Supreme Court.[147] Although the historical impetus for the enactment of the fourteenth amendment was the abolition of racial discrimination, the fourteenth amendment, unlike the fifteenth, contains no mention of race, and the Court has not limited its application to racial discrimination. Nor has the Court restricted the category of suspect classifications to race; it has ruled that classifications based upon national origin[148] or alienage[149] both are suspect, and, like those based upon race, are therefore subject to strict scrutiny.

There are, however, other classifications that fit the Court's own definition of being suspect that the Court has nevertheless refused or failed to acknowledge as such. In *Frontiero v. Richardson*,[150] a plurality of the Court could not convince the majority to declare gender a suspect classification,[151] despite the fact that classifications based upon gender possess all of the attributes of being suspect and despite the fact that women have been subject to "a history of purposeful unequal treatment" as

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143. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

144. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

145. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

146. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

147. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1969); Anderson v. Martin, 375 U.S. 399 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

148. *See* Oyoma v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

149. *See supra* note 116 (citing cases).

150. 411 U.S. 677 (1973).

151. *Id.* Compare the *Frontiero* plurality opinion, written by Justice Brennan, with concurring opinions written by Justices Stewart and Powell and the dissenting opinion written by Justice Rehnquist.

well as being relegated to "a position of political powerlessness."[152] Similarly, the Court has refused to recognize that illegitimacy fits the definition of a suspect class,[153] and has placed classifications based upon illegitimacy, along with those based upon gender, in the intermediate tier of review. Other classifications that readily could be defined as suspect have been left by the Court in the minimal tier of review. The Court has bypassed opportunities to declare that classifications based upon wealth (or lack of it),[154] homosexuality,[155] and mental illness[156] are suspect, leaving all of them prone only to the lowest form of scrutiny.

These cases manifest an internal inconsistency within the multi-level system. Unwilling to abide by its own definition of a suspect classification, the Court takes classifications that, according to its own logic, should be grouped together and randomly scatters them among all three tiers of review.

Internal inconsistency also afflicts another multi-level category, that of fundamental interests. Originally, an interest was deemed fundamental because the Court thought it to be of extreme social significance.[157] This approach opened the Court to the criticism that it was reverting to natural law formulations in deciding constitutional matters.[158] This criticism, though, was not entirely accurate, in that the Court did not purport to discover fundamental interests in the nature of things, but rather created fundamental interests for its own reasons.[159] Still, the Court's approach to the recognition of fundamental interests was subjective, and hence prone to inconsistency. The right of privacy, for example, was fundamental to the Court's way of thinking,[160] but property rights were not.[161] Although these sorts of ultimate value judgments are unavoidable in decisionmaking, some persons find their nonobjectivity disquieting. At any rate, in 1973 the Court moved to curtail the conception of fundamental interests by ruling that only those rights explicitly or implicitly guaranteed by the text of the Constitution are fundamental.[162] This definition of fundamental interests, while more objective than the former one, does not by any means eliminate all subjectivity; what is implicitly—and at times even explicitly—guaranteed by the Constitution is a matter of indeterminate judgment. Thus, the Court's delineation of fundamental interests has remained inconsistent. The right to

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152. *See supra* text accompanying note 144.

153. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Matthews v. Lucas, 427 U.S. 495 (1976).

154. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

155. *See* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976).

156. *See* Schweiker v. Wilson, 450 U.S. 221 (1981).

157. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma, 316 U.S. 535 (1942).

158. *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 UCLA L. REV. 716 (1969).

159. There is an essential difference between the methodologies of natural and positive law. According to the former, judges are not the source of law and therefore are under no obligation to explain or justify their decisions. According to the latter, judges are the source of law, and therefore it is incumbent upon them to base their decisions upon articulated reasons.

160. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

161. *See* Flemming v. Nestor, 363 U.S. 603 (1960); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Railway Express Agency v. New York, 336 U.S. 106 (1949).

162. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973).

vote in a state election,[163] to travel between states,[164] to have an abortion,[165] and to live in an extended family,[166] for instance, are all fundamental interests, whereas the right to an education,[167] housing,[168] employment,[169] and subsistence[170] are not.

It can be seen that internal inconsistency, faulty analysis, and rigidity beset the multi-level system. These basic flaws are the source of the Court's criticism of the system and increasing deviation from it, which can only lead one to wonder if there is a better way of structuring constitutional adjudication.

IV. Restructuring the System

A workable alternative to the multi-level system of judicial review is the unified structure championed by Justice Marshall.[171] The multiple tiers could be transformed readily into a comprehensive system based upon the unitary standard announced in *Mosley*, which in all instances would inquire whether there is "an appropriate governmental interest suitably furthered" by the governmental action in question.[172] Like the multi-tier approach, a unified system would provide a framework for the evaluation of governmental and individual interests. The unified system, though, would differ in several important respects from the current tiered one.

First, a unified structure would eliminate the rigidity that pervades the present multiple level approach. With the abolition of tiers, the constitutionality of governmental action would not depend upon the level of scrutiny applied in a particular case. This would obviate the need now felt by the Court in a considerable number of cases to manipulate principle and precedent in order to reach a proper result.[173] In the absence of tiers, there obviously would be no reason for the Court to abruptly refuse to deal with them, as it did in *Fullilove v. Klutznick*[174] and *Rostker v. Goldberg*.[175] Nor would the Court have reason to manufacture devices to contort the tiers, as it did in a variety of cases.[176] Thus, adoption of the proposed uniform structure would remedy the inconsistency and confusion that now prevails because of the Court's unpredictable but not uncommon deviations from the multi-level approach.

Second, a unified system would promote more accuracy in the appraisal of

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163. *See* Kusper v. Pontikes, 414 U.S. 51 (1973); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

164. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

165. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); Roe v. Wade, 410 U.S. 113 (1973).

166. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

167. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

168. *See* Lindsey v. Normet, 405 U.S. 56 (1972).

169. *See* Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318–21 (1976) (Marshall, J., dissenting).

170. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78, 90–91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519–21 (1970) (Marshall, J., dissenting).

171. *See supra* text accompanying notes 29–39.

172. *See supra* text accompanying notes 38–39.

173. *See supra* text accompanying notes 47–132.

174. 448 U.S. 448 (1980).

175. 453 U.S. 57 (1981).

176. *See supra* subparts II(B)(1)–(3).

governmental and individual interests. Under the proposed system, attention would not be diverted away from the specific merits of a case toward abstract questions concerning judicial review. The eradication of tiers would make such questions irrelevant, so that the Court could concentrate its inquiry upon the actual merits of cases. At the same time, the unitary approach would purify judicial review of categorical thinking. By lifting the shroud of *a priori* categories, the new structure would sharpen the Court's focus upon governmental and individual interests, fostering a more precise evaluation of them. Judicial review would be more direct, more realistic, and more finely attuned.

The essential differences between a unified system of judicial review and a tiered one can be illustrated by comparing the majority and dissenting opinions in *Plyler v. Doe*.[177] As previously mentioned,[178] in *Plyler* the Court was faced with a state law that denied free public education to the children of illegal aliens. The dissenting opinion in the case, written by Chief Justice Burger,[179] exemplified the multi-level approach in its most pristine form. Relying upon the *a priori* categories of the multi-tier approach, Chief Justice Burger maintained that the case presented no invidious classification or fundamental right.[180] Despite the fact that the undocumented children of illegal aliens are a discrete and powerless minority who have no control over their illegal status and therefore should not be held responsible for it, Chief Justice Burger could not say that the classification against them was invidious.[181] And, although he conceded that "[t]he importance of education is beyond dispute,"[182] he could not say that it was fundamental.[183] Working as he was with limited prefabricated categories, Chief Justice Burger found no invidious classification or fundamental right, which compelled him to subject the state law to nothing more than minimal scrutiny.[184] Applying minimal scrutiny, he and the other dissenters voted to sustain the law on the ground that it was not "irrational" for a state to take the position that it does not have the same obligation to provide education to children who are illegally present in the country as it does to children who are lawfully present.[185]

In reaching this point in the dissenting opinion of Chief Justice Burger, the reader might be struck by a certain anomaly, namely, that the Chief Justice insisted that the state law was not "irrational" only after admitting in the very first sentence of his opinion that the law was "senseless."[186] But such oxymorons are endemic to minimal scrutiny; by pretending that even senseless laws are not irrational, the minimal tier of review grants absolute deference to the legislature.

The senselessness of the state law in *Plyler* was more fully explained in the

177. 457 U.S. 202 (1982).
178. *See supra* text accompanying notes 54–59.
179. Chief Justice Burger's dissenting opinion was joined by Justices White, Rehnquist, and O'Connor.
180. 457 U.S. 202; 244–48 (1982).
181. *Id.* at 244–46.
182. *Id.* at 247.
183. *Id.* at 247–48.
184. *Id.* at 248.
185. *Id.* at 250.
186. *Id.* at 242.

Court's majority opinion, which was written by Justice Brennan.[187] He was able to deal more thoroughly with the state law by adopting an approach that approximates the unified system. While noting that the state law fell into none of the categories that invoke heightened scrutiny, Justice Brennan's opinion stated that more was involved in the case than the "abstract question" whether the law discriminated against a suspect class or infringed upon a fundamental right.[188] This extricated the majority from the categorical thinking of the multi-level structure, making it possible to analyze the state law in more depth. Justice Brennan's opinion then pointed out that the state law imposed a lifetime hardship, the stigma of illiteracy, upon a discrete class of children who were not responsible for their status as illegal aliens.[189] By depriving these children of a basic education, the opinion noted, the law denied them the ability to live within the structure of our civic institutions and foreclosed any realistic chance that they may contribute to the progress of the nation.[190] In light of these considerations, the majority believed that something akin to intermediate scrutiny was appropriate to review the state law in question.[191] So, while the categorical thinking of the dissent demanded the application of nothing more than minimal scrutiny, the more open thinking of the majority allowed for a more searching form of review.

Using this searching form of review, the majority found that there was no justification for the state law. In support of its position, the state had contended that its law protected the state's financial condition by discouraging an influx of illegal immigrants.[192] This argument was unconvincing for several reasons. First, since the dominant incentive for illegal entry into the state was the availability of employment for parents, and not the provision of education for children, the law was likely to discourage very few, if any, immigrants from illegally entering the state.[193] Additionally, there was no evidence in the record to show that illegal immigrants imposed a substantial burden on the state's economy.[194] To the contrary, the existing evidence suggested that illegal aliens underutilized state services while contributing their labor and services to the state economy.[195]

The state further attempted to justify its law by arguing that the undocumented children constituted a special burden on the state's ability to provide quality education.[196] But once again the state was unable to offer any evidence to back up its contention. In fact, the district court in which the case had originated had held that the state failed to present any credible evidence whatsoever to show that undocumented children were a special burden for the school system.[197]

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187. Justice Brennan's majority opinion was joined by Justices Marshall, Blackmun, Powell, and Stevens. Justices Marshall, Blackmun, and Powell also filed concurring opinions.

188. 457 U.S. 202, 223 (1982).

189. *Id.*

190. *Id.*

191. *Id.* at 224.

192. *Id.* at 228.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 229.

197. *Id.*

Finally, the state asserted that these children could appropriately be singled out because their illegal status made them less probable than other children to remain in the state and put their education to productive use.[198] This assertion was unpersuasive by virtue of its gross overinclusiveness and underinclusiveness. The record was clear that many undocumented children did remain in the state indefinitely, some of whom eventually become legal citizens.[199] And of course there were many children who were lawful residents of the state who would leave it before putting their education to productive use there.[200]

All of this goes to show that the state law in *Plyler* was "senseless"—it accomplished none of the purposes set out for it by the state itself. The majority opinion in the case was able to reveal this senselessness and therefore strike down the law by adopting an approach similar to the unitary framework. On the other hand, the dissenting opinion, mired in the rigidity and categorical thinking of the multi-level structure, could only stand by helplessly, blinking its eye at the senselessness of the state law before it.

Plyler demonstrates that the conversion from a multi-level system to a unified one would affect the outcome of some cases. This would not occur in many instances, but it would occur in some, particularly within the realms of what are now minimal and strict scrutiny. In fact, the proposed system would in all probability have its greatest impact upon those two areas. With the increased flexibility as well as more direct and sharper focus provided by the unitary structure, it is unlikely that governmental action would be almost automatically accepted as it now is under minimal scrutiny, and unlikely that it would be almost automatically rejected as it now is under strict scrutiny.

The unified system might breathe renewed life into the areas presently subjected to minimal scrutiny. The more acute focus of the system would make it more difficult for the Court to justify legislation that is grossly overinclusive or underinclusive, as is currently done in the minimal tier.[201] Weak recitations from the Court that legislation "may" be related to a valid purpose[202] would be more prone to be revealed for the pretensions that they are. Similarly, it would be more troublesome for the Court to sustain legislation on the basis of imaginary or hypothetical state objectives, as presently happens with minimal scrutiny.[203] General, conclusory statements from the Court, such as that the legislature apparently believed that a statutory scheme was "equitable,"[204] would be less persuasive than they now are under minimal scrutiny. In other words, because of its more penetrating focus upon the merits of governmental ends and means, the unitary structure probably would not allow the total

198. *Id.* at 229–30.

199. *Id.* at 230.

200. *Id.*

201. *See supra* text accompanying note 76.

202. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

203. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Railway Express Agency v. New York, 336 U.S. 106 (1949); Goesart v. Cleary, 335 U.S. 464 (1948).

204. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178 (1980).

deference to governmental action that currently characterizes minimal scrutiny.[205] This would make for a more realistic constitutional jurisprudence, and, combined with the flexibility of the new system, would alleviate the Court's need to engage in subterfuge to upgrade minimal scrutiny.[206]

At the other end of the spectrum of what is currently the multi-level system, the new system might reduce the harshness of strict scrutiny. Under the proposed system, if it genuinely can be shown that legislation suitably furthers an appropriate governmental purpose, it would be upheld even if it employs what is now referred to as a suspect classification or if it impinges upon what is now called a fundamental right. It is highly probable that in nearly all instances such legislation could not be shown to suitably further an appropriate governmental interest; but in those cases in which it is shown, the legislation would be sustained under the new system—as it should be.

Within the domain of what is presently strict scrutiny, the proposed system would mitigate the Court's need to carve out artificial distinctions.[207] For instance, in cases involving the right of interstate travel, the more direct and searching appraisal of state interests that would transpire under the new structure would eliminate the necessity to twist precedent and logic so as to exempt some residency requirements from strict scrutiny.[208] Under the unified framework, in a case such as *Jones v. Helms*[209] it would be unnecessary to resort to such tactics in order to uphold the statute that elevated the crime of child abandonment from a misdemeanor to a felony when the abandoning parent left the state. Instead of pretending that the statute did not penalize the right of interstate travel, as the Court did in *Jones*,[210] the new structure would allow the Court to honestly recognize that the statute did punish the right of interstate travel, but justifiably so in order to effectuate the overriding state interest in protecting dependent children. Without changing the result in *Jones*, the unitary system could have directed the Court to a more sound basis for its decision.

On the other hand, the one year residency requirement for filing a divorce action that the Court sustained in *Sosna v. Iowa*[211] most likely would meet a different fate under the unified structure. The decision in *Sosna* upholding the state residency requirement rested upon an exception for state laws regarding domestic relations[212] that would be irrelevant under the new approach. The Court's opinion in *Sosna* identified no appropriate state interest that was suitably furthered by the residency requirement,[213] and therefore, the case in all likelihood would be decided differently under the *Mosley* analysis.

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205. *See supra* text accompanying notes 20 & 81–83.

206. *See supra* subpart II(B)(1).

207. *See supra* subpart II(B)(3).

208. *See supra* text accompanying notes 98–111.

209. 452 U.S. 412 (1981).

210. *See supra* text accompanying notes 112–15.

211. 419 U.S. 393 (1975).

212. *See supra* text accompanying notes 108–11.

213. In *Sosna*, the Court asserted that there was a state interest in protecting the property and custody rights of the out-of-state spouse. This would not amount to an appropriate state interest, however, unless the state court had jurisdiction to adjudicate those rights, which is unlikely. Furthermore, the residency requirement could not be said to suitably further

The proposed system also would reduce much, if not all, of the irregularity that presently characterizes the Court's decisions involving classifications based upon alienage.[214] Rather than grant a categorical exemption to alienage classifications within the domain of state sovereignty, as is done now,[215] a more searching examination of state interests could be accomplished within the new structure. When the state could demonstrate that its legislation was suitably furthering an appropriate interest in protecting its sovereign functions, alienage classifications would be permissible; but when such a showing could not be made, the classifications would be impermissible. Rather than categorizing interests, the Court would be balancing them more precisely.

It should be emphasized that the unitary structure itself is essentially ideologically neutral. Although no structure can eliminate the need for value judgments in decision-making, the unitary structure does not assign values to the governmental and individual interests being balanced upon the constitutional scale, since only the Court can do that. Hence, the new system would favor neither "conservative" nor "liberal" positions. What it would accomplish would be the enhancement of the Court's perception of interests by making the Court more perspicacious. The heightened vision provided by the system may affect the results in some cases, but it will not realign the Court's value judgments.

V. CONCLUSION

At this point in American constitutional history, it is fair to say that the multi-level system of judicial review has outlived its usefulness. Spawned as a reaction to the political exigencies of the New Deal Court crisis,[216] the multi-tier approach may have had some strategical value at one time, but it never has been able to provide a theoretically sound framework for constitutional adjudication. As a system of judicial review, it always has been and always will be an overly rigid structure that retards constitutional analysis by diverting thought away from the merits of cases and by constricting thought through *a priori* categories.[217] Continuous tinkering with the multi-level system over the years since its inception has not been able to remedy its fundamental defects, and, in fact, may actually have made matters worse. Even the major revision of adding an intermediate tier of scrutiny has proven to be little more than a stopgap.

Because of its basic defects, the multi-tier system severely restricts the ability of the Supreme Court to establish a healthy constitutional jurisprudence. The system

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that state interest, since that interest was left completely unprotected in situations where the complaining spouse lived within the state for at least one year.

The Court also asserted that there was a state interest in minimizing the susceptibility of its divorce decrees to collateral attack. But this would not amount to an appropriate state interest unless the one-year residency requirement somehow provided additional security to divorce decrees, which is doubtful. In short, the Court seemed to assume that the residency requirement suitably furthered an appropriate state interest, whereas deeper examination probably would have revealed that it did not.

214. *See supra* text accompanying notes 116–30.

215. *See supra* text accompanying notes 123–30.

216. *See supra* text accompanying notes 2–18.

217. *See supra* part III.

frequently leaves the Court with no other choice but to uphold extremely dubious governmental action or to strike it down by departing from the system through the distortion of precedent and logic. Needless to say, this infests constitutional law with considerable disorder.

By now it is no exaggeration to say that the multi-level system has reached a point of substantial disarray. As we have seen, deviation from the system has become so common as to render constitutional adjudication a desultory affair.[218] Given the basic flaws of the multi-tier system, it is most improbable that this deviation will abate in the future. Changes in the Court's personnnel are unlikely to improve the situation without a corresponding change in the Court's method of decision-making. If constitutional law is ever again to enjoy a fair degree of coherence and stability, it will be necessary to convert the multi-level approach to a unified system of judicial review.

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218. *See supra* subparts II(A)-(C).